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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No. 230

SWIFT & COMPANY, PACKERS, *et al.*,

Petitioners,

—v.—

COMPANIA COLOMBIANA DEL CARIBE, S. A.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT

NICHOLAS J. HEALY, 3RD.,
Proctor for Respondent.

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IN THE

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Petitioners,

—v.—

COMPAÑIA COLOMBIANA DEL CARIBE, S. A.,

Respondent.

BRIEF ON BEHALF OF RESPONDENT

This is a review of an appeal from an order, *pendente lite*, vacating an attachment of the Steamship CARIBE, ex-ALACRAN, which was levied upon under a writ of foreign attachment in an admiralty cause pending in the District of the Canal Zone.

The CARIBE was not proceeded against *in rem*. She had no part in the maritime affreightment and loss upon which the suit is based and there was therefore no maritime lien against her. She is involved only as the subject of a foreign attachment levied upon her, purportedly under General Admiralty Rule No. 2, as the alleged property of an *in personam* respondent.

Respondent's Statement of the Case

Compañia Transmarstina Colombiana S. A.,[1] a Colombian corporation, was an ocean carrier engaged in

[1] Text, *infra*, p. 9

[2] Hereinafter for brevity called "Cia Transmaritima". This is the maritime respondent in the admiralty suit.

Colombian domestic and foreign commerce. It owned and operated the motorship CALI and the steamship ALACRAN in general trade in Pacific and Caribbean waters. In January, 1948, one Noboa, a Colombian national and one of the petitioners herein, engaged with Cia Transmaritima for the carriage on the CALI of a shipment of 30,000 bags of rice from Guayaquil, Ecuador, to ports in Cuba. The CALI loaded the shipment, bills of lading for it were issued to Noboa for delivery to his order at the Cuban ports of destination and the CALI sailed from Guayaquil on her voyage. En route and near the island of Grand Cayman, a British possession, the CALI sprung a serious leak and was beached on the island. The vessel and a part of the rice were totally lost on January 17, 1948.

It will be observed that the entire transaction was in foreign commerce. The parties to the affreightment were Colombian nationals, the ship was Colombian, the transportation was from Ecuador to Cuba and the loss was in British waters.

At the time of the loss, Cia Transmaritima owned the ALACRAN, as she was then named. For about six weeks after known loss of the CALI, the ALACRAN, openly operated by Cia Transmaritima, went about her regular business in the trade, calling at various ports in the area, including the ports of shipment and destination of the CALI's cargo, several Colombian ports and the ports of the Canal Zone.[3] She continued to be openly operated by Cia Transmaritima until February 25, 1948, when she was sold to Compania Colombiana del Caribe, S. A.,[4] a Colombian corporation incorporated during that month, which

3. Her movements (undisputed) during this period are shown in detail at T. 68.

4. Hereinafter called "Cia Caribe".

is the respondent in this Court. The sale was made pursuant to Public Deed No. 4 of February 25, 1948, recorded in Colombia. T. 42, 64. On March 4, 1948, when the ALACRAN arrived at the Colombian port of Barranquilla, she was officially re-registered under the name of Cia Caribe, as owner, a new "patente", or certificate of registry was issued to her, and her registered name was officially changed from ALACRAN to CARIBE, pursuant to Resolution No. 94 of that date. T. 42, 64. Thereafter she loaded cargo for Colombian west coast ports and, operated by Cia Caribe, sailed for Cristobal, Canal Zone, to fuel and to make her passage through the Canal. T. 64, 68, 74-5.

All these events had transpired before this suit was filed in the District Court, which was not done until March 7. No notice of claim or demand had ever been made to Cia Transmaritima as respects the loss of cargo on the CALI and there had been no threat of suit or legal proceedings against it in the Canal Zone, Colombia or elsewhere. T. 64.

The petitioners here are the libelants below. They are, Noboa, the Colombian shipper, fourteen firms and individuals alleged to be Cuban nationals and Swift and Company, Packers, alleged to be a Nevada corporation. All the libelants except Noboa allege that they "became the owners" of portions of the CALI's rice cargo and suffered damages because of its loss. T. 3, 5-7.

The petitioners selected the Canal Zone as the theatre of their contemplated litigation and evidently had advance notice of the arrival of the CARIBE. Their libel was filed on March 7, 1948 (a Sunday) and process thereon was issued by the Clerk and lodged with the Marshal on that day. T. 10, 11. The libel, disregarding imperfections, is more or less the conventional admiralty libel *in personam* for cargo loss or damage and names Cia Transmaritima as the sole respondent. Its prayer is for process citing the

respondent to appear and answer, or, if it cannot be found within the District, that *its* goods and chattels, "in particular a certain vessel known as the ALACRAN or the CARIBE"[5] may be attached by process of foreign attachment. T. 7-8. The process commanded the Marshal to cite the respondent if it could be found in the District and, if it could not be found, to attach its goods and chattels, in particular the steamship ALACRAN or CARIBE. T. 10.

According to the Marshal's return (T. 11-12), he made no attempt whatsoever to find the respondent in the District.[6] The CARIBE had fueled at Cristobal and while passing through the Gatun locks on March 8, 1948, the Marshal had boarded her. The return states that "in obedience to the Command contained therein, I served the same by going on board the SS CARIBE * * * by displaying the original to the Master * * * and by taking into my official custody the S. S. CARIBE * * * and also some gear, hoists, winches, etc., from the M. V. CALI". T. 11.

A few hours later on March 8, the petitioners filed their amended and supplemental libel (hereinafter called the "amended" libel), naming Cia Transmaritima *and* Cia Caribe as respondents.[7] Another process was issued directing the Marshal to cite the respondents and if *they* could not be found, to attach *their* goods and chattels, in particular the CARIBE. T. 20. Again without attempting to find or inquire for either respondent, the Marshal made

5 Evidently the petitioners' proctors had prior knowledge of the sale of the vessel or at least of her change of name.

6 It was well known the vessel's agent, Keene Line, maintained an office at Ancon, Canal Zone. It would seem that the barest good faith would call for the effort of inquiry. But evidently the last thing petitioners wanted was a service on or appearance by Cia Transmaritima.

7 Evidently the master of the CARIBE had protested to the Marshal the seizure of the CARIBE as the property of Cia Transmaritima and exhibited the ship's certificate of registry.

another levy and seizure of the vessel (T. 21) and she has ever since remained in his custody.

The amended libel, in a single paragraph, reiterates and re-alleges all the allegations of the original libel, stating that whenever "respondent" is mentioned, it refers to the respondent Cia Transmaritima. Par. I, T. 15. These incorporated allegations are the only allegations in either pleading which deal with the affreightment and loss on the CALI and constitute the only cause or ground for relief which is of admiralty cognizance. They are directed entirely against the respondent Cia Transmaritima. The additions of the amended libel are in Pars. II, III and IV, T. 15-16. They are, disregarding the wealth of conclusion, to the effect that since the filing of the original libel (on the previous day) the libelants had learned that on March 4, 1948, Cia Transmaritima had attempted to divest itself of its property, particularly the CARIBE, "in fraud of the libelants' rights", by a fictitious transfer of the ship to Cia Caribe, which was merely its creature or *alter ego* and, in furtherance thereof, it had caused the vessel to be registered in Colombia under the ownership of Cia Caribe. Alternatively, it alleged (Par. IV) that Cia Caribe was indebted to Cia Transmaritima for the full or a substantial part of the purchase price of the vessel. All these allegations were made upon information and belief only and each libel was verified upon information and belief by one of the local proctors for the petitioners.

The prayer of the amended libel, after praying for process and foreign attachment if the respondents could not be found, was, alternatively, that the CARIBE be attached in the hands of Cia Caribe as the property of Cia Transmaritima, "and/or" as the sole security for the agreed purchase price of the vessel, and that Cia Caribe be also made

a garnishee and cited to answer as to the debts, credits and effects of Cia Transmaritima in its hands.[8]

During the time of these proceedings, there was no judge in residence. The incumbent District Judge, Hon. Bunk Gardner, had left for the United States on March 5.[9] Canal Zone Admiralty Rule No. 23[10] provides a means for speedy summary relief against an improper or irregular attachment but, without a judge present, there was no expedient way to examine the propriety of the attachment or control the acts of the Court's ministerial officers.

On March 15, a verified claim as owner of the CARIBE was filed on behalf of Cia Caribe by the ship's Master. T. 23-4. A stipulation for costs, secured by a cash deposit of $250, was given by Cia Caribe's proctor (T. 24) and a motion was noticed for an order dismissing the libel as to Cia Caribe and vacating the attachment. T. 25-6. A supporting affidavit of the proctor was attached. T. 27-47.[11] The papers were mailed to Judge Gardner, then in

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8 The latter relief was allowed to the petitioners. The order appealed from required Cia Caribe to answer as a garnishee as to any funds, indebtedness, money or property which it owed or had in its hands, belonging to Cia Transmaritima. T. 114-16, Par. 4 on p. 116. This part of the order would have been complied with long ago if the petitioners had not appealed from the order and obtained a stay of its execution pending appeal. The District Court proceedings were thereby suspended.

9 He resigned his office on April 1st, 1948 (75 F. Supp. X), without ever returning to the Canal Zone. Judge Hancock, before whom the proceeding under review was had, was appointed at the end of June, 1948 (77 F. Supp. X), and took his bench some time later.

10 Text herein at p. 10.

11 The ground of the motion was primarily that the Court should decline jurisdiction of the entire cause as a suit between foreigners. T. 25-6, 48. The supporting affidavit, although partly factual and documentary, was principally an argument. T. 27-32.

Kentucky, who made a memorandum and order on March 31 that he had concluded that "the motion of respondents cannot be sustained at this time and on this showing" and ordered that the motion be overruled "without prejudice to the respondents filing any further motion that they may desire to file". T. 49-51. No reasons were given by the Judge,[12] who resigned his office on the day after giving the order.

On March 24, separate pleadings, denominated "Special Appearance and Exception to the Jurisdiction", were filed on behalf of each respondent. T. 48-49. Evidently these were not sent to Judge Gardner and were never passed upon by him or the successor judge.

After the overruling of the motion of March 15, the district remained without a judge for several months. Meanwhile, and on June 11, Cia Transmaritima appeared generally and answered the libels on the merits. It admitted the shipment and partial loss of the CALI's cargo, asserted its carrier's defenses and asked limitation of its liability, if any, in accordance with the United States statutes.[13] It denied all the allegations added by the amended libel, and alleged that at the time of institution of the suit, the CARIBE was not its property. T. 52-7.

On the same day, Cia Caribe appeared generally, answered the amended libel and filed exceptions to the interrogatories directed to it as garnishee. T. 57-60. The answer denied any connection with the affrightment and loss of the CALI's cargo, denied all the allegations of fraud in connection with the sale, denied that it was indebted to Cia Transmaritima therefor and alleged that at the time of the institution of the suit and of the attachments, the

[12] The "memorandum" suggested at T. 51 was never made.

[13] 46 U. S. Code, 183, *et seq.*

CARIBE was its property. The exceptions to the garnishee interrogatories were never brought on for hearing by either party and remain undetermined.[14]

Very shortly after Judge Hancock was appointed to the bench, the petitioners moved the District Court for an order for the sale of the CARIBE, *pendente lite*, on the allegation that she was deteriorating in custody. Cia Caribe then filed its notice of motion, with supporting affidavit, for the dismissal of the amended libel as to it and that the attachment of the CARIBE be vacated and discharged. T. 60-70. The two motions were noticed for hearing on the same day, August 23, 1948. The motion of Cia Caribe and the order pursuant to it vacating the attachment of the vessel are the proceedings now under review.

At the request of the petitioners, both motions were continued to August 30, upon which day they were argued and taken under submission by the Court. T. 71.[15] On September 20, the District Court rendered its opinion, embodying findings of fact and conclusions of law. T. 72-8. The opinion ordered that the levy of the attachment on the CARIBE be discharged and the vessel released, but Cia Caribe was held to answer as a garnishee as to any funds, indebtedness, money or property which it owed or had in its possession, belonging to Cia Transmaritima. Proctors were directed to prepare an order discharging the attachment of the vessel and otherwise conforming to the opinion. T. 77-8.

Petitioners moved for a rehearing (T. 80) which was elaborately argued, but the Court denied rehearing with

14 However, as heretofore stated, the District Court, in the order discharging the attachment, directed Cia Caribe to answer fully as a garnishee. See note 8, p. 6

15 The District Court made no order on the petitioners' motion for the sale of the vessel and did not mention the motion in the opinion.

an opinion, T. 107-13. The order appealed from (T. 114-16), was then entered.

Petitioners appealed to the Court of Appeals for the Fifth Circuit. That Court expressed grave doubts as to whether the order was appealable (T. 131), but, resolving its doubts in favor of its jurisdiction, it examined the proceedings on merit and affirmed, one Judge dissenting. T. 128-42. A petition for rehearing was denied. T. 153-57.

The matter is here on this Court's order of October 10th, 1949, allowing certiorari. T. 158.

Extracts from Applicable Statutes and Court Rules

Title 28, United States Code (Revised)

§1291. Final decisions of district courts.

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

General Admiralty Rules

(Promulgated by the United States Supreme Court)

Rule 2. Suits in Personam—Process In Arrest in Same.

> In suits *in personam* the mesne process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent in the nature of a capias, as the libellant may in his libel or information pray for or elect; in either case with a clause

therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel, to the amount sued for, if said respondent shall not be found within the District. . . .

Canal Zone Admiralty Rules

(Benedict on Admiralty (6th Ed.), Vol. 5 (Recompiled), p. 234a)

Rule 23. Summary Release From Arrest or Attachment

In case of the attachment of property, or the arrest of the person (except in suits for seamen's wages when the attachment is issued upon certificate pursuant to Sections 4546 and 4547 of the Revised Statutes), the party arrested or any person having a right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or a manifest want of equity on the part of the libellant, have an order from the judge requiring the libellant to show cause instanter why the arrest or attachment should not be vacated.

ARGUMENT ON THE APPELLATE JURISDICTION

POINT I

The order vacating the attachment was not final and therefore not appealable. The appeal should have been dismissed in the Court of Appeals.

The apprehension of the Court of Appeals as to its appellate jurisdiction (T. 131), was well founded. The order appealed from dealt only with the aspects of the provisional remedy of attachment. The merits of the cause remain with the District Court, undetermined. Even on the attachment aspects, the levy was vacated only as to the physical ship and was sustained under the alternate prayer of the amended libel that Cia Caribe be proceeded against as a garnishee. Nor did it vacate the attachment of the "gear, hoists, winches, etc., from the M. V. Cali" which the Marshal had found aboard the CARIBE and had levied upon. T. 11.

The generality that federal appellate jurisdiction does not exist except to review judgments and orders which determine final rights is not open to dispute. It applies to admiralty appeals. *Nyanza S. S. Co. Ltd.* v. *Jahncke Drydock No. 1*, 264 U. S. 43.[10] See also, *Schaefamsgraber* v. *Hamburg American Line*, 294 U. S. 454; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Macdicar* v. *Lindsay*, 60 U. S. 199.

The Court of Appeals assumed jurisdiction, despite its doubts, but it must be that if appellate jurisdiction did not exist under the statute, it was not assumable at discretion, however expedient its assumption may have appeared.

[10] Text, *supra*, p. 9.

We urged the lack of appellate jurisdiction in the Court of Appeals and deem it our duty to do so here.

It is settled by the decisions of this Court and many of the Courts of Appeals that orders vacating or refusing to vacate attachments in admiralty or at law are not final and are not appealable under the Federal statutory plan, even though appeals from such orders are authorized by the statutes or decisions of many states.

This specific application of the rule was made by this Court in the admiralty case of *Cushing* v. *Laird*, 107 U. S. 69, 76, affirming a Circuit Court decision to the same effect (6 Fed. Cas. No. 3510, pp. 1043, 1050). The precise issue there was the question whether funds levied upon in the hands of a garnishee were the property of the admiralty respondent or of a stranger to the litigation. The garnishee admitted the possession of the funds designated in the writ but asserted in the garnishee return that they were the property of the stranger. That issue was determined *pendente lite*, the District Court deciding that the funds belonged to the admiralty respondent and directing their payment into Court. The garnishee appealed from that order. Thereafter judgment was taken against the respondent, who had never been served and had not appeared, and the funds in the possession of the garnishee were ordered applied in satisfaction of the judgment. The garnishee also appealed from the second order. On the appeal to the Circuit Court it was held that an appeal did not lie from the order *pendente lite* because it was not final or determinative of ultimate rights and that the second order was final and appealable. Reviewing the second order, the Circuit Court reversed, finding and holding that the attached funds were not the property of the admiralty respondent and belonged to the stranger. On appeal to this Court, the Circuit Court's decisions were affirmed; the appeal as to the determination and order

pendente lite being dismissed (107 U. S. 69, at p. 76), and the reversal of the final order affirmed.

There are many cases at law involving appeals from orders vacating or refusing to vacate attachments and the following authorities are to the effect that, whether the *ad interim* order sustains the attachment or vacates it, the order is not final or appealable: *Leitensdorfer* v. *Webb*, 61 U. S. 176, 185; *Crooker* v. *Knudsen*, C. A. 9, 232 Fed. 857-8; *Assets Collecting Co.* v. *Barnes King Development Co.*, C. A. 2, 209 Fed. 206; *Atlantic Lumber Co.* v. *L. Bucki Lumber Co.*, C. A. 5, 92 Fed. 864; *Hammer* v. *Scott*, C. A. 8, 60 Fed. 343.

In the courts below, these petitioners cited various cases involving admiralty proceedings *in rem* where the ship proceeded against was the sole respondent. Of course, orders or judgments dismissing such a ship from arrest prior to adjudication of the merits are final and complete, for the effect is to dismiss the only respondent without day. Such a case is *The Pesaro*, 255 U. S. 216. Cases in this category are not comparable to the case at bar or those above cited where the ship or property attached was not proceeded against *in rem* but by attachment in aid of an *in personam* suit against a personal respondent who is left in court with ultimate rights against him undetermined. This Court noted the distinction in *Nyanza S. S. Co. Ltd.* v. *Jahncke Drydock No. 1, supra*.

It was also argued below that even though the District Court had found no attachable interest of the respondent Cia Transmaritima in the attached ship CARIBE the order was nevertheless appealable because her owner, Cia Caribe, had been joined as a respondent and the order in effect, if not in terms, operated to dismiss the amended libel as to Cia Caribe and put it out of the case, except as a garnishee. It is true that the motion of Cia Caribe asked dismissal of the amended libel as to it and the Dis-

trict Court's views were that no cause of action within the jurisdiction of admiralty had been stated against Cia Caribe. But neither the opinion nor the order appealed from directed the dismissal of Cia Caribe as a respondent and it is apparently still before the District Court on its general appearance, subject to the court's jurisdiction. However, even if the order appealed from, aided by anything in the opinion of the District Court, can legitimately give the order the effect of finally dismissing the cause as to Cia Caribe, it still remains an *ad interim* order and not subject to an appeal. It leaves the co-respondent Cia Transmaritima, sued on the same liability, before the Court with its and the petitioners' ultimate rights still undetermined. In such a situation the decisions of this Court in *Nyanza S. S. Co. Ltd.* v. *Jahncke Drydock, No. 1, supra* and *Hohorst* v. *Hamburg American Packet Co.*, 148 U. S. 262, teach that the final dismissal of one or more respondents sued jointly is not an appealable order as long as any other respondent remains before the Court and the ultimate rights of the suitor remain undetermined. The *Hohorst* case has been followed consistently in the circuits down to the present time. The most recent case applying it, of which we have note, is *Romão* v. *Keyes*, C. A. 2, 170 F. (2d) 310, decided in October, 1948.

Applying these principles and authorities to the situation at bar, it would appear that there was no jurisdiction in the Court of Appeals to review the order appealed from and that the appeal to the Court of Appeals should have been dismissed by it. It is suggested that this Court should go no further with the case, here pursuant to its writ, than to determine the absence of appellate jurisdiction and remand the cause to the Court of Appeals with instructions to dismiss the appeal.

ARGUMENT ON THE MERITS

POINT II

The attachment was properly vacated because of a complete failure of proof of the right of petitioners to maintain it.

This point is not met by any of the four specifications of error which were urged for the granting of the writ and which, stated in somewhat different form, are now urged for reversal. One presentation of it will suffice without reiteration of it in the subsequent discussions of petitioners' points.

On any theory or approach to the case, it is inherent that the only liability asserted is the carrier's liability of the respondent Cia Transmaritima. It follows that any right to the provisional remedy of attachment under General Admiralty Rule No. 2, exists only as to things in which, at the time of the levy, that respondent had some *property* interest, legal, equitable or otherwise.

Petitioners' theory as pleaded and presented is that, although there was a sale of the CARIBE by Cia Transmaritima before the jurisdiction of the District Court attached, there remained in Cia Transmaritima, at the time of the levies, a latent equitable interest, reachable by them because of alleged fraud against them in the inception and accomplishment of the sale. That theory, if tenable in law to support an attachment, required factual proof.

The verified claim of Cia Caribe, as unqualified owner of the attached vessel, raised a square issue of *fact* as to the existence of any sort of property right in the vessel in Cia Transmaritima. The motion to vacate the attach

ment brought up that issue for determination by the District Court and put petitioners to their proof that Cia Transmaritima had *some* sort of attachable interest in the CARIBE.

The petitioners offered no proof! They made no showing in *any* form or upon *any* theory that Cia Transmaritima had any right, title or interest in the CARIBE, legal or equitable. They made no offer of evidence in any form in support of their allegations of fraud, equitable title or equitable lien or to show any infirmities of any kind in the asserted absolute title and ownership of the vessel in Cia Caribe. They were not barred or limited by any objection or ruling of the Court from adducing evidence to show an attachable interest according to any theory upon which they wished to proceed, however untenable and however fantastic their theories might be.

Their essential position at the hearing was and still remains that they were entitled to maintain the levy on the ship on the bare, unsupported allegations and assertions in their libels and prayers, and that the burden of proof of *negativing* an attachable interest in Cia Transmaritima was on Cia Caribe.[17]

That position is wrong. The burden of proof on the right to maintain the attachment was strictly upon the petitioners who asserted the right and the Court of Appeals so held. T. 132.

This Court's decision on the merits in *Cushing* v. *Laird*, 107 U. S. 69, 83-4,[18] sustains the Court of Appeals. The issues there were strictly the issues of ownership of property (funds admittedly held by garnishees) attached in an admiralty cause, pursuant to General Admiralty

17 See Petitioners' brief, Caption of Point 4) p. 21 and ensuing discussion at pp. 23-5, particularly the third full paragraph on p. 25.

18 Cited also in connection with our Point I, *supra*, p. 12.

Rule No. 2, as the property of the admiralty respondent. The garnishees answered, asserting that the funds belonged to a third party. This Court held:

> "The libellants, in this suit against Laird [the admiralty respondent] personally, and against Foster & Thomson as his garnishees, *have the burden of proving that the fund in the hands of the garnishees belongs to Laird.* There is nothing in the acts of Prideau, [the third party] or of the garnishees as his attorneys, which estops the garnishees to deny that fact *and to put the libellants to proof of it.* • • • There being no estoppel, either of record or in pais, *the libellants fail to prove that the fund belongs to Laird, and cannot therefore maintain their attachment.*" [10]

The District Court's order vacating the attachment of the ship was unqualified and unlimited (T. 115) and recited that the libelants had offered no proofs other than the allegations of their libels. T. 114. In affirming the order, the Court of Appeals held that there had been a complete failure of proof and that was the essential basis of the affirmance. It said:

> "If the respondent has any interest in her it must be an equitable one or one arising from unpaid purchase money; and after the lapse of a year no evidence has yet been put into this record that there is any such interest. The vessel when seized was not in the possession or service of respondent, and the burden is surely on libelants to show a justification for her

[10] Emphasis throughout is ours.

seizure. * * * Neither on the hearing, nor on the rehearing completed September 20, 1948, more than six months after seizure, have libelants proved anything at all to support their contention, alleged on information and belief only, that the vessel is really the property of respondent Compania Maritima. As a summary remedy the motion to vacate was properly sustained. There is, however, no adjudication of the title." T. 132-3.

In short, the situation of the petitioners at the conclusion of the proceedings in the District Court was that of a plaintiff on a trial of issues of fact who sits silent and declines to offer proof in support of an alleged right.

It is indisputable that on a controverted issue of fact, allegations of fact in a pleading, however forcefully expressed, are not proofs unless unqualifiedly admitted. *The Naveman*, 303 U. S. 68, 75.[21]

We naturally thought from the petitioners' amended libel that they would probably endeavor to show at least *some* facts in support of some legal or equitable property interest of Cia Transmaritima in the CARIBE. We could only anticipate, from the amended libel, something in the nature of a collateral attack on the safe for fraud against these petitioners. So anticipatory proofs tending to negative the alleged facts were included in the supporting

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20 Sic. The motion for rehearing was argued October 11 and decided November 5. September 20 was the date of the decision on the principal motion. T. 78.

21 Compare the view of the dissenting judge (T. 140-41), to the effect that the fact that petitioners charged a fraudulent transfer did not make it incumbent on the libelants to "prove their case by their pleadings." Neither did it *entitle* them to do so. The issue of fact on the attachment was collateral to any issue on the merits of the cause.

affidavit. Had proofs been offered along that line by the petitioners we should have objected to their competency, sufficiency and materiality on jurisdictional grounds. If, on evidence offered by the petitioners, the Court had excluded it on jurisdictional grounds, a consideration of jurisdiction might have been necessary on the appeal to sustain the order. But as the petitioners offered *no proofs whatsoever*, our points of law as to lack of jurisdiction and substance have no target except the pleading itself.

The District Court did hold, incidental to the vacating of the attachment, that except for the admittedly valid maritime cause of action against Cia Transmaritima for cargo damage, the amended libel stated no grounds for relief cognizable in a court of admiralty. That determination was sound, as we shall hereafter urge, but the inferences in the petitioners' presentation and in the opinions of the dissenting judge, that those matters of law were determined *in advance* to cut off the petitioners' opportunities to present evidence upon their chosen theory, is contrary to the facts. The District Judge did not give his ruling on the jurisdictional points until weeks after the hearing nor did he make any effective order discharging the attachment until after the petitioners had exploited all the possibilities of their case on their application for a rehearing. At no time did they offer to present evidence.

It is suggested in this Court, for the first time in the case, that the petitioners' counsel were given only a few days notice of the hearing on the motion to vacate and had no reason to believe that supporting evidence would be necessary. Alternatively, they suggest that they did not offer evidence on the motion because a previous motion to vacate had been made and had been denied by the predecessor judge and it "seemed inconceivable" that the

incumbent judge would "disregard that ruling."[22] We cannot speak for counsel's state of mind or their conceptions or misconceptions of the requirements of their case. But as far as the Court and counsel for the respondent were concerned, petitioners were afforded all the opportunity for a fair hearing and full presentation of their evidence that they appeared to want.

It is also said that the garnishee interrogatories attached to the amended libel and directed to Cia Caribé (T. 18) were not required to be answered by it prior to the entry of the order vacating the attachment of the ship (Brief, p. 9), and that those interrogatories were "aimed at obtaining, under direct oath of the respondent's officers, evidence in support of the libelants' (fraud) charges." Brief, p. 5. Cia Caribe had excepted to the interrogatories

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22 Petitioners' Brief, pp. 7-8, and note 29, p. 7. The noticed date for the hearing, August 23 (T. 61), was selected by Cia Caribe's proctors because petitioners' proctors had noticed their motion for an interlocutory sale of the CARIBE for the same date. The motion papers on the motion to vacate the attachment were served and filed August 16. T. 63, 70. Petitioners' local proctors asked for a continuance until August 30 to give them time to communicate with their associates at New Orleans. Cia Caribe's Canal Zone proctor said that Cia Caribe would consent to the continuance if petitioners' proctors would agree to continue the motion for a sale to the same date. *That was refused.* After hearing both sides on the question of a continuance the Court set down both motions for hearing on August 30, two weeks after service of the motion papers on the motion to vacate. See T. 71. Upon conclusion of the hearing on August 30, Cia Caribe's New York proctor offered to remain in the Zone if any further proceedings on the motion were in contemplation. Counsel for petitioners replied that there was no necessity. Thereupon both sides rested and the motions were submitted for decision. T. 71. The motion to vacate was not decided until September 20 (T. 78). On October 6, petitioners moved for a rehearing on nine grounds (T. 79-80), none of which had anything to do with any desire on petitioners' part to introduce evidence. The motion was heard October 11 (T. 82) and denied November 5. T. 113.

(T. 59) which abated any duty to answer them until disposition of the exceptions. If the petitioners had to obtain the sources of evidence to support their case from Cia Caribe, they had only to advise the District Court and move the exceptions for summary determination. They did not suggest at any time until now that answers to the garnishee interrogatories were in any way necessary to a presentation of their case for maintaining the attachment on the ship.[23]

These afterthought suggestions of the petitioners cannot supply the essential defect in their case to maintain the attachment—the absence of any proof of right on any conceivable theory of right.

The petitioners' brief makes repeated references to the extraneous material appearing in this record at T. 83-106 and to the comments thereon by the dissenting judge. T. 140. It is said that this material was "introduced" and "offered" (Brief, pp. 6, 8) by the libelants as proof. Actually it was filed arbitrarily *after* the hearing and submission of the motion for rehearing with the petitioners' *reply* brief thereon. See T. 82-3. It was not offered as evidence or received in evidence. No leave to offer it was sought or granted. A copy of it was not even *served* on proctors for Cia Caribe, who had no opportunity to object to it or comment upon it. The District Court

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23 At the time of the hearing the essence of the interrogatories had been answered by allegations and denials in the pleadings of both respondents (T. 52-9) and the affidavits of Charles E. Ramirez in support of the motion (T. 27-47; 63-70). These documents disclosed upon oath that Cia Caribe claimed unqualified title to the ship by sale, where and how the sale was accomplished, the absence of any indebtedness on the purchase price, the names of the officers, directors and stockholders and their holdings in the two Colombian companies. If the petitioners needed more than that to make a case for their attachment, the whole of the liberal admiralty process for discovery was available to them. See General Admiralty Rules Nos. 31 to 32 D, inclusive.

denied the rehearing on November 5. T. 143. The first suggestion of an attempt to include this material as a part of the record was in petitioners' praecipe for appeal. T. 123, 125. We immediately noted our protest. T. 126-7. We repeated the protest in our brief in the Court of Appeals but the device of thus attempting to make a record "*vi et armis*" seemed so obviously improper that we did not make a formal motion to strike it from the record. However, the dissenting judge appears to have taken its presence in the record as indicating that it was validly admitted or offered. In any event, the material had nothing whatsoever to do with the ownership of the CARIBE. The majority judges saw it in its true light, holding and reiterating in the opinion denying rehearing that *no* proof of ownership in Cia Transmaritima had been made. T. 132, 154.

The Court of Appeals held that the petitioners had failed to *prove* any right to attach the CARIBE for the alleged debt of Cia Transmaritima. We cannot conceive how the soundness of that can be open to question and that was everything which was necessary to justify the order to vacate.

POINT III

There is no jurisdiction in admiralty to trace and apply assets after the manner of a creditor's bill and an attachment which must be so worked out is not sustainable.

This point is in answer to the petitioners' specification of error No. 1 and its Point A for reversal (Brief, pp. 12; 14-17).

In considering this aspect of the case, the distinction must be observed between *absence* of jurisdiction as to subject matter and the *existence* of such jurisdiction which a court has discretion to *decline* on account of the foreign character of the parties and the transaction. Petitioners have never seemed able to grasp the distinction. In their application for the writ, they confused the two matters completely; in their present brief they purport to separate them but their specification No. 1 and Point A still seriously confuse the two.[24]

The foreign character of the transactions and parties has nothing whatsoever to do with subject matter jurisdiction and its limitations. The absence of such jurisdiction would be just as vital a defect if all the parties had been United States citizens, the ship a United States ship and the sale a domestic transaction.

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24 The jurisdiction which the Court of Appeals characterized as "doubtful" was jurisdiction of subject matter. T. 133, par. 3. In the concluding sentence of the same paragraph it said that "even if there be jurisdiction" (of subject matter) there was a discretion to *decline* it. Neither point was definitely decided by the Court of Appeals nor were those points necessary to a decision on the appeal. Point II, *supra*. On the petition for rehearing, the Court of Appeals explained that it had only held that the supplementary libel *might* be dismissed for discretionary reasons. T. 154; Petitioners' Brief, p. 14, n. 2.

No one has ever disputed that the cause of action for damage to cargo was maritime and was of admiralty cognizance. Both of the Courts below have properly so held. The District Court probably had discretion to *decline* jurisdiction of it as a foreign transaction, but did not do so.[25] That cause, upon which only the carrier respondent could be liable, is still pending and undetermined in the District Court. The jurisdictional vice inherent in this case is that the petitioners, by their *amended* libel, endeavored to engraft upon their maritime cause allegations of fact which deal with a strictly non-maritime subject matter and sought relief which a Court of Admiralty has no jurisdiction to afford. They sought to make a collateral attack for fraud upon the sale of an uninvolved ship, made long after the maritime liability, if any, arose. They prayed that the vendee, Cia Caribe, be held liable for and its property be applied in satisfaction of the maritime liability of its vendor.

Petitioners assert (Brief, p. 15), that this controversy as to the transfer of the ship is only incidental to the main issue for negligent loss of cargo. *That* is certainly true. But no one could possibly mistake the essence of it as a cause to trace and apply assets after the manner of a creditors' bill in equity. That is a cause and a remedy unknown in the admiralty.

Implicit in the amended libel is the proposition that a sale of the ship *was* made to Cia Caribe but attained by a fraud to which it was a party and of which Petitioners are entitled to complain. They would have those things and the nullity of the sale adjudged, meanwhile resorting to attachment to sequester the ship and apply it ultimately in satisfaction of the judgment they hope to obtain against the vendor. Any

25 This was asked and denied without prejudice in the earlier proceeding determined by Judge Gardner.

such application of the attached ship could only follow a substantive judgment against Cia Caribe that it had been a guilty participant in the allegedly fraudulent transfer. Unless an Admiralty Court has jurisdiction to make such a judgment, it has no power to afford the provisional remedy of attachment in anticipation of it. It cannot be doubted that a suitor may not have the provisional processes of admiralty in aid of a judgment which is beyond its jurisdiction to render.

The inherent lack of jurisdiction in the admiralty to deal with non-maritime controversies or to afford remedies peculiar to other systems such as law or equity or those now combined systems, is elementary.

In *The Eclipse*, 135 U. S. 599, the libelants and intervenors claimed the right to possession of a ship as against the holders of the legal title. Their rights were severally asserted as beneficiaries of an express trust and as purchasers under an unexecuted contract of sale. This Court held that the rights asserted and remedies sought were equitable and not within the cognizance or powers of an admiralty court. It said (at p. 608):

> "So far as the creditors and intervenors were concerned, if the former desired to wind up the trust, or the latter to enforce an alleged contract of sale, which is indeed what is asked by this intervention, they should have resorted to a different tribunal. While the Court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake, *Andrews* v. *Essex Ins. Co.*, 3 Mason, 6, 16; or declare or enforce a trust or an equitable title, *Ward* v. *Thompson*, 22 How. 330; *The Amelia*, 6 Ben. 475; *Kellum* v. *Emerson*, 2 Curtis, 79; or exercise jurisdiction in matters of

account merely, *Grant* v. *Dodlou*, 20 How. 162; *Minturn* v. *Maynard*, 17 How. 477; *The Ocean Belle*, 6 Ben. 253; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart* v. *The John Jay*, 17 How. 399. * * * There is nothing maritime about the claims of the intervenors, and the intervention was properly dismissed for want of jurisdiction over the subject matter."[26]

The rights here asserted by petitioners and the remedy sought by them are as purely equitable and non-maritime in character as anything discussed in *The Eclipse*.

The same kind of rights and remedy were involved in *Yone Suzuki* v. *Central Argentine Ry. Co.*, C. A. 2, 27 F. (2d) 795, affirming 19 F. (2d) 645, 1927 A. M. C. 678, 692; cert. den. 278 U. S. 652. The suit was in admiralty for ship demurrage under charter parties and was clearly maritime in character. Ultimate liabilities for the demurrage were asserted *in personam* against Gano Moore Co., the charterer of the ships, and Gano Moore Coal-Mining Co. The latter was a successor company to Gano Moore Co., had been incorporated subsequent to the accrual of the liability of Gano Moore Co. and had succeeded to the business and assets of that company by subsequent transfers. It had been impleaded in the suit as a co-respondent with Gano Moore Co. upon allegations of those facts and the claim was that it was merely the "dummy" or "alter ego" of Gano

[26] These limitations upon the jurisdiction and remedies available in the admiralty are referred to in many subsequent decisions of this Court. See *Detroit Trust Co.* v. *The Barlum*, 293 U. S. 21, 32, regarding the absence of jurisdiction to deal with ship mortgages (except preferred mortgages where the jurisdiction is given by statute); and *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 123, to the effect that admiralty lacks power to grant equitable relief. Both cases cite *The Eclipse*, *supra*.

Moore Co. On that account it was charged with liability for the demurrage. Judgment was given against Gano Moore Co. but denied against its successor.

The District Court,[27] held:

> "Gano Moore Coal Mining Company, Inc. was not organized until 1922 and not until after the charter parties were entered into by Gano Moore Company. The questions whether or not the assets of Gano Moore Company were fraudulently transferred to Gano Moore Coal Mining Company, Inc. and whether or not Gano Moore Coal Mining Company, Inc. is Gano Moore Company in disguise, and whether for that or any other reason Gano Moore Coal Mining Company, Inc. is liable for the debts of Gano Moore Company, *do not involve any maritime relations and are questions which are peculiarly cognizable by a court of equity or a court of law.* These suits are distinguishable from those referred to by the respondent [the consignee which had impleaded the Moore companies] in which there was no controversy as to any of the material facts establishing one corporation to have been a dummy for another *at or before the time liability arose.*"

Affirming the District Court, the Court of Appeals[28] held:

> "It is contended that Gano Moore Coal-Mining Company, Inc., ought to be held directly liable for the obligations of Gano Moore Company. Courts of admiralty have held corporations which owned and controlled

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27 S. D. N. Y., Bondy, J., 19 F. (2d) 645, 653, 1927 A. M. C. 678, 692. The quoted part is from the A. M. C. report as the corresponding passage in the Federal volume is garbled by the printer.

28 27 F. (2d) 795, 800. Opinion by Judge Augustus N. Hand.

others liable for the latter's acts. Luckenbach S. S. Co. v. W. R. Grace & Co., C. C. A., 267 F. 676; The William Van Driel, Sr., C. C. A., 252 F. 35. This was because the controlled companies were mere dummies or agents. But *Gano Moore Coal Mining Company was not acting as agent or dummy for Gano Moore Company when the claim for port demurrage arose. The former company did not then even exist, and no liability based on agency or any kind of representation can be worked out.*

"It seems pretty apparent from the evidence that the stockholders of Gano Moore Company divided all its quick assets and then incorporated Gano Moore Coal Mining Company, Inc., for the purpose of succeeding to the good will of the former company and embarking on a stock-jobbing career. In addition to its other activities, it did a business of buying and selling coal like the original company. *But no liability for the debts of Gano Moore Company can be worked out that is not based on property received from the former,* and that property, so far as disclosed, was largely, if not entirely, good will. *The liability of Gano Moore Coal-Mining Company must depend upon the extent of the value, if any, of the property transferred to it.* Okmulgee Window Glass Co. v. Frink, C. C. A., 260 F. 159. *We are referred to no case where a remedy to reach and apply assets, ordinarily afforded only by a creditors' bill, has been applied by a court of admiralty. It seems quite foreign to its jurisdiction, and we hold that such relief cannot properly be granted in this suit.*"

In *The Melmay*, D. C. Canal Zone, 1932 A. M. C. 1396,[29] resort was had by suitors to the identical device used by

[29] Not reported in "Federal".

petitioners here. The libelants were underwriters suing as subrogates or assignees of the owners of cargo shipped on a vessel which was totally lost. They went to the Canal Zone and lay in wait for the ship *Melmay* to make the passage of the Canal. That vessel was owned by a different carrier corporation which was created subsequent to the loss, but it was alleged to be the successor or "alter ego" of the original carrier and liable as such. The alleged facts behind this theory were that the ultimate beneficial ownership in the two corporations was in an individual stockholder, common to both, and that the *Melmay* had been built in whole or part with the proceeds of hull insurance paid for the loss of the ship which had carried the libelants' cargo. A levy of foreign attachment under General Admiralty Rule No. 2 was obtained and levied upon the *Melmay* when she was making her transit of the Canal. It will be observed that the theory of the libelants there was the exact parallel of the theory of these petitioners.

The *Melmay* owners twice moved to vacate the attachment. The first motion raised points going to the regularity of the levy and was denied by the District Court. This opinion was eventually reported in 1933 A. M. C. 1057. After denial of the first motion, the *Melmay* owners made a second motion challenging the subject matter jurisdiction and the power of the Court to sustain any sort of attachment in aid of it. This motion was granted; the vessel was released and the case was not carried further.

We shall not attempt to examine in detail the long opinion of the District Court. It was laid upon these two points, paralleled in the *Yone Suzuki* case (*supra*) and in the case at bar:

1932 A. M. C. 1396.

(1) There was nothing in the pleading or evidence on the hearing to render the *Melmay's* corporate owner liable on the maritime cause of action. The bare fact that it did not exist at the time liability accrued precluded any possibility that it had participated as an *alter ego*, "dummy" or agent for the carrier respondent.

(2) Assuming that the libelants were substantively entitled to trace assets of the carrier respondent into the hands of the *Melmay's* owner, they were not in the proper forum to do it, since a court of admiralty had no jurisdiction to adjudge such equities or give a remedy because of them. On that account the attachment was vacated.

In deciding the jurisdictional question here at bar, the District Court squarely followed *The Eclipse*, *Yone Suzuki* v. *Central Argentine Ry.* and *The Melmay*. Even if it had rested the vacating of the attachment upon that single ground, the decision would have been unassailable. The Court of Appeals did not determine the question, holding rightly that there had been no showing of a right to maintain the attachment upon any theory, admiralty or non-admiralty. It did say, in passing the question, that such admiralty jurisdiction was "doubtful" and it believed that there was no precedent for it. T. 133.

As to this, the petitioners appear to agree.[31] They make no effort to meet the jurisdictional defect except by reiterating that an admiralty court certainly has the right to inquire whether attached property "belonged to the respondent" and urging that the cases of *Gardner* v. *Dantzler*, C. A. 5, 98 F. (2d) 478, and *Lee* v. *Thompson*, Fed. Cas. No. 8202, are so closely analogous on holdings and dicta as to constitute precedents in favor of the jurisdiction.[32]

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[31] Brief, p. 10, second full paragraph.

[32] The Court of Appeals pointed out the distinctions in these cases. T. 133.

Gardner v. Dantzler was a suit *in personam* for cargo loss against two brothers. The solvent brother had put title to the ship in the insolvent brother and conducted business in the latter's name. In that manner he made and undertook performance of the contract of affreightment which resulted in the loss and, when sued on it, tried to avoid by claiming that the owner and contracting party was his insolvent brother. This was a true case of *alter ego* or dummy relation, inherent in the maritime liability. Essentially the case was the same as *Luckenbach S. S. Co. v. W. R. Grace & Co.*, C. A. 4, 267 Fed. 676, and others which were referred to and distinguished in the Court of Appeal's opinion in the *Yone Suzuki* case, *supra*.

Lee v. Thompson was a supplementary proceeding in aid of a writ of execution issued upon a final judgment in admiralty. An issue of fraudulent transfer of property levied upon was tried in that proceeding in the admiralty court. The authority relied upon to do it was former General Admiralty Rule No. 21 (now Rule No. 20) and the civil law practices in Louisiana. Rule 20 deals only with writs of execution on a final admiralty decree for the payment of money. In addition to the writ, the rule provides that: "Any other remedies shall be available that may exist under the State or Federal law for the enforcement of judgments or decrees."

It is a far stretch of imagination to find analogy in a permission to resort to state practices under Rule 20 for the enforcement of a final judgment and an attachment *in limine* under General Admiralty Rule No. 2 which gives no corresponding permission.[38]

[38] The Court of Appeals suggested that *after* final judgment and pursuant to the permissions of Rule 20, the admiralty court probably could, like a court of equity, seek out and condemn equitable assets in aid of its writ. T. 133. The proposition is in no way involved in

The petitioners in Point A, and elsewhere, appear to suggest that the sale of the CARIBE was in some sense in purposeful flouting of the prospective jurisdiction and process of the District Court. That is totally fantastic. The sale was made in foreign parts, between foreign non-residents of the district and dealt with property which had no situs in the District. It was fully accomplished before the District Court's jurisdiction was ever invoked and before anyone but the petitioners knew it *would be invoked*. The petitioners had no "right" to attach anything unless and until there should be concurrence *in* the District of all the conditions of General Admiralty Rule No. 2—the filing of a libel on the maritime cause, inability to find the maritime respondent and a valid levy on *its* property. In view of the common nationality of the shipper and carrier and the constant availability of Cia Transmaritima to be proceeded against in the country of its residence, the Canal Zone was the last place in which it should have been sued.

It is submitted that the lack of subject matter jurisdiction was fatal to the controversy and relief sought in the amended libel and to the maintenance of the attachment. That alone justified the vacating of the attachment.

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this case, but that seems to us a suggestion open to very grave doubt. The admiralty court does not acquire non admiralty jurisdiction because it renders a final decree and running its executions against latent or other equitable interests would necessarily require it to determine the existence of such equities, perhaps even against a non-maritime owner. That would be an indirect exercise of a jurisdiction which admiralty does not have. But no doubt the desired result could be accomplished by suing on the admiralty court's judgment in any court of general jurisdiction and asking for equitable relief.

POINT IV

The District Court was justified in declining jurisdiction of the controversy tendered in the amended libel on discretionary grounds.

This point is addressed to petitioners' Specification No. 2 and Point B, Brief, pp. 12-13; 17-20. We assume, argumentatively, the existence of subject matter jurisdiction, contrary to our position as taken in the foregoing Point III.

It is not disputed by petitioners that if it were not for the alleged United States citizenship of one libelant, Swift & Company, Packers, the District Court would have been fully justified in declining, as a matter of discretion, any aspect of the case, even the maritime cause of action. They insist, however, that the presence of this one citizen libelant bars the Court from the exercise of that discretion and gives the libelants an *absolute right* to have their cause heard and determined in all respects in the District Court.

Preliminarily, it should be pointed out that there is no *proof* as to the citizenship or interest of the libelant Swift. There are allegations in both libels that Swift is a Nevada corporation and that it "became the owner" of portions of the rice before loss. On exceptions or a motion addressed only to the sufficiency of the pleadings, those allegations might properly be taken as true, but on the motion to vacate an attachment, the *facts* are put in issue and everything necessary to sustain the libelants' right must be *proved*. *Cushing* v. *Laird*, 107 U. S. 69, 83-4. The twelfth ground of our motion expressly re-asserted the denials of the answers as to Swift's citizenship and interest.

But without waiver of the absence of factual proof, we will assume, with petitioners, that Swift was a citizen of

the United States and acquired a *bona fide* ownership in the rice prior to loss, presumably by a transfer of title and the bills of lading from the foreign shipper, Noboa. Upon that assumption we have the presence of one citizen libelant, in a transaction otherwise entirely foreign to the commerce of the United States, suing upon rights derived entirely by assignment or transfer under a contract made by a foreigner with a foreigner—rights which were patently acquired in the citizen libelant's *foreign* business. No greater or different substantive rights are asserted for Swift than are asserted in the same libels for the shipper, Noboa. The cases for the foreign shipper and the citizen and other foreign libelants are identical.

The narrow question is whether, under these circumstances, discretion in the District Court to decline jurisdiction is barred and the District Court compelled to hear and determine the case because the citizen libelant has an absolute right that it do so.

Petitioners admit frankly that they have no authority holding that there *is* no discretion to decline jurisdiction. Brief, p. 19. Neither have we any square authority where the citizen libelant was a transferee of the title and documents. We do have strong authority for the proposition that where the rights of a citizen libelant are derived from a foreign shipper, his citizenship alone does not give an absolute right to resort to the United States courts of admiralty and discretion to accept or decline jurisdiction remains with the District Court in like manner as when the suit is maintained by the foreign shipper. That has repeatedly been held in cargo suits brought by citizen underwriters as assignees or subrogates of foreign shippers.

The leading and most exhaustively reasoned authority we have found is *United States Merchants & Shippers Ins.*

Co. v. A/S Den Norske, etc., C. A. 2, 65 F. (2d) 302.[34] The voyage there was from Norway to China, the shipper Dutch, the carrier and ship Norwegian. The citizen underwriter paid the cargo loss and brought suit in the Southern District of New York. On motion, the respondent asked the District Court to dismiss at discretion on account of the foreign character of the affreightment and the parties to it. The District Court held that the overall balance of convenience was greatly in favor of a Norwegian tribunal and dismissed the cause, despite the citizenship of the libelant. The Court of Appeals held that unless the American libelant could sue in the District Court *as a matter of right*, because of its citizenship, the District Court had discretion to retain or decline jurisdiction which was not reviewable except for abuse. The Court then held that when a citizen's interest is derived from a foreign shipper, the generality of the citizen's right to resort to United States admiralty courts is to be qualified by considerations of circumstances and convenience. It was pointed out that a holder of derivative rights acquires and takes them voluntarily and for his own advantage; that insistence upon trial in a United States forum may be and often is an additional burden upon the foreign carrier not contemplated by the contract—one which may impair or even cut off his defenses and one which the foreign shipper could not insist upon imposing. The conclusion and holding was that the

34 Opinion by Judge Learned Hand.

35 *The Tricolor*, 1 F. Supp. 934.

36 The statement in the dissenting opinion that the respondent "knew or should have known" that it was dealing with Swift, a citizen of the United States (T. 53, 54. Brief 19) is unsupported. Swift's name never appeared in the affreightment transaction except as a name and address to be notified upon the arrival of the CALI in Cuba. T. 33-36. There was nothing as to its citizenship or its present or prospective interest, if any.

citizen's right of resort to admiralty courts is not absolute and it was for the District Court to determine whether the jurisdiction was to be retained or rejected. The order dismissing the cause was affirmed.

To the same effect are *Whittig* v. *Canada S. S. Lines*, W. D. N. Y., 59 F. (2d) 428; *Insurance Co. of North America* v. *British India Co.*, E. D. La., 38 F. Supp. 47, and, in England, *La Societe du Gaz* v. *Armateura Fraycais*, H. of L., 23 Lloyds List L. R. 209.

In the instant case, all considerations of convenience of the Court and of justice to the foreign respondents militated against a trial of their rights in the United States Court; particularly on the aspect which attacked the validity of the CARIBE's sale. That was a Colombian transaction involving Colombian law—perhaps the legal effect of Colombian documents. All witnesses to sustain the respondents' case are non-residents and it is doubtful if competent evidence could be obtained from Colombian officials without resort to letters rogatory. The petitioners, however they acquired their rights to sue, voluntarily involved themselves in a foreign contract of affreightment with a known Colombian carrier.

We submit, therefore, that the District Court, other considerations aside, did not abuse discretion and was justified in divorcing the maritime and non-maritime aspects of the case and in rejecting, if it had any, its jurisdiction to proceed with the latter.

Petitioners infer that jurisdiction, if discretionary, should have been retained because (1) the CALI's bills of lading incorporated the provisions of the United States Carriage of Goods by Sea Act[37] and (2) because, in its answer on the merits, Cia Transmaritima claimed the benefit

37. 46 U. S. Code 1300, *et seq.*

of the United States limitation of liability statutes. As to the latter, *any* shipowner, citizen or foreigner, is entitled to make a case for limitation of its liability and to pursue remedies available in the forum of suit to give it effect. As to the former, the effect of making the Carriage of Goods by Sea Act a part of the contract of affreightment could only be of concern in the maritime cause of action which is not involved here and as to which the District Court *retained* jurisdiction. The Act has nothing whatsoever to do with the sale of the CARIBE or the rights asserted in the additions in the amended libel or the validity of the attachment.

Any suggestion that the District Court could not separate the two causes of action, retain one and dismiss the other at discretion cannot be valid. Different considerations of justice and expediency apply. Furthermore, an admiralty court has the power and duty to sever and dismiss non maritime aspects of a case. *The Ada*, C. A. 2, 250 Fed. 194. There would seem to be no compelling reason why the same should not be done when jurisdiction is discretionary.

In re Louisville Underwriters, 134 U. S. 488, is suggested as an authority for retention of discretionary jurisdiction. Brief, p. 20. The subject was not even involved. All the case holds is that a non-resident *citizen* may be sued in admiralty and his property attached if he cannot be found in the district of suit. That has been settled law for years.

There was no abuse of discretion in the holding of the District Court declining to proceed further with the fraud issues. It did not make that determination until after the petitioners had had full opportunity to make their factual case for attachment if they had one. There is no error in the Court of Appeals' holding that the cause, as against Cia Caribe, *might* have been dismissed entirely upon dis-

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[8] 46 U. S. Code 183, *et seq.*

cretionary grounds. But as we have shown heretofore, determination of the point is not *necessary* to sustain the order to vacate.

POINT V

The successor Judge had full power to grant the order vacating the attachment.

Petitioners argue in their Point C (Brief, pp. 20-1) that Judge Hancock, who granted the motion to vacate the attachment of the CARIBE, "should not be permitted to hold that his predecessor (Judge Gardner) had abused his discretion in taking jurisdiction of a case * * *." Judge Hancock did no such thing. He decided a new and greatly expanded motion, and did so without saying anything whatsoever about the propriety of Judge Gardner's decision on the previous one.

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9 Petitioners insist that the motion passed upon by Judge Hancock was the same motion as that made on March 15, 1948 passed upon by Judge Gardner. (Brief, p. 21). They are wrong. Judge Hancock made it clear in his original opinion (T. 73-4) that he was deciding the new motion: "On August 16, 1948 the respondent * * * filed motion to vacate and discharge attachment on steamship 'CARIBE and for an order dismissing the amended and supplemental libel * * *." This action is now before this Court on the above motion * * *." The statement in Judge Hancock's opinion on rehearing (T. 107) that the motion was filed on March 15 is an obvious inadvertence. That motion was filed August 16, as Judge Hancock correctly stated in his original opinion. The confusion was obviously due to the fact that the motion of August 16 was based, not only on the affidavit of Charles E. Ramirez certified on that date, but "upon all the pleadings, process and papers filed herein, and proceedings heretofore taken herein * * *." T. 63. Included in those papers was the *original* of March 15 and the supplemental and other documents attached thereto, which papers Judge Hancock examined in arriving at his decision. T. 107-8.

The first motion, which was presented to Judge Gardner *in absentia*, was denied by him on March 31, 1948, *at this time and upon this showing*," and, "*without prejudice to the respondents' filing any further motions* that they may desire to file." T. 50. Judge Gardner resigned the day after this decision.[40]

The claim that Judge Gardner's order determined conclusively the validity of the attachment or even the matter of jurisdictional discretion is unsound. That he did not intend to do so is clear from the wording of the order itself. Even if he had wished to make a conclusive order on any issue he would have lacked the power. A cause, while *sub judice* in a district court, is under control of the *court*, not of an individual judge. Even a decision or judgment on the merits of a cause may be altered by a successor judge on motion to vacate or for a new trial or rehearing. This Court made that clear in *Matter of The Life and Fire Ins. Co. v. Wilson*, 33 U. S. 291, where Mr. Justice McLean said:

> " * * * But the district judge is mistaken, in supposing that no one but the judge who renders the judgment, can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change[41] of the incumbents cannot and ought not, in any respect, to injure the rights of the litigant parties. "

See also *Cahill v. Mayflower Bus Lines*, C. A. 2, 77 F. (2d) 878, cert. den. 296 U. S. 629; *St. Louis Southwestern Ry. Co. v. Henwood*, C. A. 8, 157 F. (2d) 337, cert. den. 330

40. 75 F. Supp. A.

41. So. Should read "change".

U. S. 836; *The Del-Mar-Va*, E. D. Va., 56 F. Supp. 743. The case last cited was an admiralty suit for collision damage. The trial judge decided to enter an order allowing one of the litigants to reopen the case in order to take the testimony of an absent witness. He did so after considering the matter in an informal manner, without benefit of a full statement of the law or the facts, or of oral argument. He died shortly thereafter and it was held that his successor in office had power to change the ruling and refuse to permit the case to be reopened.

In the cause at bar, it is clear that Judge Gardner would have had full power to entertain the second motion. It is equally clear that his successor in office had the same power, and that the respondent's rights were in no respect altered by the change of judges.

POINT VI

Cia Caribe's motion and preliminary proofs were sufficient to raise issue on the right to maintain the attachment. The burden was then with the petitioners.

The substance of petitioners' Specification No. 4 and Point D seems to be that the burden of proof on attachment issues was not with them and that the motion to vacate was simply a "defensive plea" which only raised issues to be postponed and determined as issues inherent in the merits of the cause. Incidental to this, they urge that the affidavit and documentary proofs tendered by Cia Caribe were incompetent, without evidentiary value and insufficient to comply with the requirements of Canal Zone Admiralty Rule No. 23.

The underlying error in their position is as to where the burden of proof lies. This was discussed at length in our foregoing Point II. This Court, in *Cushing v. Laird*, 107 U. S. 69, 83-4, and the Court of Appeals at bar have held that the burden, upon a challenged right to maintain an attachment, is with the libelants who assert it. It is not an issue of ultimate liability but an issue as to a provisional remedy. The claim was the right of the petitioners to attach the CARIBE as the property of the respondent Cia Trans maritima. The "defense" or opposition was that Cia Transmaritima had no property interest in it. The power of the District Court to determine that issue *pendente lite* is not even open to argument. All that was necessary to bring the issue on for hearing was a preliminary showing that the questions were substantial and seasonable notice to the petitioners.

Canal Zone Rule No. 23 outlines one way to bring up such issues on very short notice, perhaps within one day. Under it, upon an *ex parte* showing of probable cause, the Court may issue its order to the libelants to show cause *instanter* why the attachment should not be vacated. That is merely a recognition of the need for a more speedy determination of the issues than could be had on a regularly noticed motion. On the application for the order, the Court does not determine the facts or the law as to the right, but only the existence of probable cause for a hearing of them on shorter notice. Whether the issues are brought on by order to show cause or full notice of motion, the burden of proof is where the *law* places it—on the party who asserts the right to attach. While nearly all the maritime districts

[illegible] order to show cause [illegible] notice of motion. *McAuliffe v. Coughlin*, [illegible] Cal. 268, 38 p. 730. It is simply a means of shortening the usual [illegible] notice. *Petition of Logan Co.*, 138 N. Y. 557, 565, [illegible] 88 [illegible] 489.

have rules substantially identical with Canal Zone Admiralty Rule 23, orders to show cause are seldom sought. The more usual and thoroughly approved procedure is for the challenger of the right to attach to bring up the issues by a regularly noticed motion to vacate."

The Court of Appeals, looking to substance, held that our motion to vacate was made pursuant to Canal Zone Rule 23 and noted that one of our grounds (the thirteenth) was in the very words of the rule. T. 132. The only difference in our proceeding by notice was that the petitioners had more notice of hearing than they would have had from an order to show cause.

If a preliminary showing of probable cause was necessary to suggest that the motion had substance, the preliminary showing of Cia Caribe was more than that contemplated by Rule 23. It included the verified claim of Cia Caribe as unqualified owner of the attached ship, a showing by affidavits of the facts of the sale and possession and operation of the ship by it at the time of the levies. The affidavits went further and showed facts, readily verifiable from public records, which tended to negative the assertions of fraud or bad faith in the sale transaction. The notice of motion stated its points of law in great detail. The proof was certainly sufficient to show that its challenge of the right to attach had substance in fact and law and, beyond that, it could not be required to go unless and until the petitioners made at least a *prima facie* case in support of their right.

"See *The Heinrich Arp*, D. C. Z., 1936 A. M. C. 1198; *The Melmay*, D. C. Z., 1932 A. M. C. 1396; *The Valmar*, E. D. Pa., 38 Supp. 615; *United States v. Specified Quantities of Intoxicating Liquors*, C. A. 2, 7 F. (2d) 835. In the latter case, Judge Hough held that, in law or in admiralty, the validity of an attachment or seizure *in rem* can always be tested by motion to vacate, that the practice was proper and elementary. See T. 107.

The ship was attached as the property of Cia Transmaritima while it was in the possession and control of Cia Caribe. The existence of an attachable interest in Cia Transmaritima was inherent in any vindication of the right to attach. It was not necessary, preliminarily or on the hearing, for Cia Caribe to show an absolute title or ownership in itself: but it was necessary for the petitioners to show an attachable property interest existing in Cia Transmaritima.[45]

The petitioners' complaints that Cia Caribe's proofs were incompetent or insufficient have no substance. The burden was not with it and it was confronted with nothing to controvert. Furthermore, its proofs by affidavit and supporting documents were left undenied and uncontroverted after full hearing of the issues of fact and law.[46]

There is no substance in the suggestion (Brief, p. 23) that this motion was a proceeding for a summary judgment on the merits, analogous to a proceeding under the Federal Rules of Civil Procedure. The motion to vacate went only to the attachment.[47] The merits of the cause remain pending

45 A fair analogy can be drawn from the prize cases. The issue is "prize or no prize"; not the validity or strength of the title of the owner or claimant who appears in the prize court.

46 The competency of proof by affidavit on issues incidental or provisional to the merits is not open to question. Their probative value is for the Court to determine. Such proof, if controverted, may be weak or insufficient, but if allowed to stand uncontroverted, becomes strong, even conclusive. *Commissioners of Excise* v. *Purdy*, 13 Abb. Pr. (N. Y.) 434, 437 S; *Union Bank* v. *Mott*, 9 Abb. Pr. (N. Y.) 106, 109; *National Life Ins. Co.* v. *Braswell*, 209 Ky. 165, 217 S. W. 413.

47 Motions for summary judgment on fact issues going to the merits are unknown to the admiralty. That remedy was not supplied by the Rules of Civil Procedure which by their express terms do not apply in Admiralty. Rule 81 (a) (1). But historically, admiralty courts have determined summarily fact issues as to provisional and incidental rights on petitions upon affidavits and documents authenticated by them, without oral testimony. So did courts of law and equity, prior to the adoption of the Rules of Civil Procedure.

and undetermined in all factual aspects. That is the patent distinction between the case at bar and *The Celtic Monarch*, C. A. 9, 138 Fed. 711, which the petitioners see as in conflict. In *The Celtic Monarch*, a vessel was proceeded against *in rem* as the negligent participant in a collision. It was attempted to have her dismissed as a party by a motion for summary judgment on affidavit proof that she was not negligent. That went to the very essence of the merits of the cause. The Court held, very properly, that such an issue of fact could not properly be tried summarily or on affidavit proof.[48]

In addition to the reasons heretofore discussed we submit that the vacating of the attachment is sustainable upon numerous other grounds going to its inequity and irregularity in procurement which were fully presented and argued below. Some of them are:

1. The failure of the marshal to make any effort to find or even inquire for the respondent Cia Transmaritima before making the levy. The Court of Appeals passed this question on the view that the returns could have been amended. They were never amended and it is patent on the record that no inquiry was made. Cf. *Cushing* v. *Laird*, D. C. Fed. Cas. No. 3508.

2. The obvious lack of any substance or basis for the attack upon the sale of the Caribe, manifested by the conclusions,

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48 Issues of *law*, going to jurisdictional defects or the sufficiency of a pleading to state grounds for relief or defense, are, of course, determinable summarily in *all* courts; the issues of law being raised by demurrer, exceptions, motion to dismiss, motion for judgment on the pleadings and otherwise. We raised such issues of law in the aspects of our motion which challenged the sufficiency of the cause of suit attempted to be stated in the amended libel as to Cia Caribe as a respondent.

uncertainties and "and or" allegations of the amended libel and confirmed by the failure to offer any proof of them over a period of opportunity extending for eight months. The fraud asserted patently exists only in the mind of the pleader.

3. The gross irregularity of the Clerk in accepting the amended libel without an order of Court and issuing process of attachment upon it in disregard of the requirements of General Admiralty Rule No. 23[49] and Canal Zone Admiralty Rule No. 17.[50] The former authorizes amendments to the form and substance of a libel only on motion and order; the latter authorizes the bringing in of a new party only upon *petition* by an adverse party or the new party himself. Both rules were ignored. In effect, Cia Caribe was made a party and its vessel was attached on proceedings not taken as of right and allowed by the *Clerk of the Court!* He had no judicial power to determine the propriety of amendment, the bringing in of Cia Caribe or the right to attach its property.

In connection with these suggested points we invite consideration of the decision in *The Heinrich Arp*, D. C. Z., 1930 A. M. C. 1198.

[49] General Admiralty Rule 23. Amendments to Libels. In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made, on motion, at any time before the final decree, on such terms as the court shall impose. * * *

[50] Canal Zone Admiralty Rule 17. New Parties. Whenever, from the death or any of the parties, or changes of interest in the suit, defects in the pleadings or proceeding, or otherwise, new parties to the suit are necessary the persons required to be made parties may be made such either by petition on their part or by petition of the adverse party. Benedict on Admiralty (6th Ed.) Vol. 5 (Recompiled), p. 232.

CONCLUSION

The case should be remanded to the Court of Appeals with directions to dismiss the appeal for lack of appellate jurisdiction. In the alternative, this Court should affirm the decision of the Court of Appeals sustaining the District Court's order vacating the attachment of the S. S. CARIBE.

Respectfully submitted,

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